IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL WRIT PETITION NO.2220 OF 2005

Santosh Jugal Kishor Ginoria]
Aged about 30 years]
an Indian Inhabitant, residing]
at C-403, Gokul Nagar II,] Petitioner.
Thakur Village, Kandivali (East)] (brother of
Mumbai 400 101] the detenu)

versus

1. The State of Maharashtra]
Through the Secretary to the]
Govt.of Maharashtra, Home]
Department, Mantralaya,]
Mumbai - 400 032]

2. Neela Satyanarayana,]
The Principal Secretary to]
the Government of Maharashtra]
Home Department (Appeals]
And Security), and Detaining]
Authority, Mantralaya,]
Mumbai - 400 032.]

3. The Superintendant of Prison]
   The Mumbai Central Prison]
   Arthur Road, Mumbai]

4. The Superintendant of Prison]
   Nasik Road, Central Prison]
   Nasik.]

5. The Secretary,]
   Hon'ble Advisory Board,]
   Mantralaya, Mumbai.] Respondents.

Nr.Maqsood Khan for the petitioner.
Mrs.A.S.Pai, APP, for the State.

CORAM : D.G.DESHPANDE
S.A.BOBDE, JJ.
DATED : JUNE 29, 2006.

ORAL ORDER

1. Heard Advocate Mr.Maqsood Khan for the petitioner and, learned APP Mrs.Pai for the State/respondents. Petitioner is the brother of detenu and his detention under the COFEPOSA Act is challenged by this petition. Mr.Maqsood Khan,

appearing for the petitioner, raised three grounds in this regard.

2. Firstly, according to the advocate for the petitioner, vital and important documents, relied upon by the detaining authority and referred to in the detention order, were not supplied to him and this has resulted his right of making an effective representation. Secondly, the detenu had sent one representation to the Advisory Board with a specific prayer not to forward his representation to the State Government. But the Advisory Board forwarded the representation to the State Government which ultimately rejected it and this has deprived the detenu of his right to make representation to the State Government at a time of his choice and it has deprived him of raising those ground before the State Government as per the law prevailing upon which rejection cannot be raised. Thirdly the advocate for the petitioner contended that the activities of the detenu did not amount to smuggling of goods but it amounts to abetment of smuggling. Therefore, section 3(1)(ii) of the COFEPOSA Act was attracted.

3. However, we are not required to consider all the three grounds raised by the advocate for the detenu because this petition can be allowed on the first ground i.e. Amended Ground No.4(XI).

4. In this regard Mr.Maqsood Khan, appearing for the petitioner, has pointed out that the detaining authority has, in para 5 of its detention order, referred to the statements of two brokers i.e. a statement dated 12.04.05 of Shri Pramod P. Thakkar and another statement dated 12.04.2005 of Shri Govind Prakash Gupta. He contended that even though copy of the statement of Prakash Thakkar furnished to the detenu, the copy of the statement of Govind Gupta was not furnished and this has resulted in affecting his right of making an effective representation.

5. On the other hand, the learned APP has contended that as per the affidavit of detaining authority, the detaining authority had not relied upon the statement of Govind Gupta, but there was mere passing reference to the statement of Govind Gupta and, therefore, it was not obligatory on

the part of the detaining authority to furnish the copy of the statement of Govind Gupta.

6. As against this, advocate Mr.Maqsood Khan, appearing for the petitioner, has contended that the detaining authority cannot be permitted to take this stand or raise such a plea, in view of the fact that in para 5 in the order of detention, there is detailed discussion regarding the statement of Govind Gupta. We are reproducing some portion of Ground No.5 as below:-

> "The other broker Shri Govind Prakash Gupta in his statement dated 12.04.2005 has stated that you approached him in the month of January 2004 to get a flat for you on rental basis and accordingly, he arranged a flat for you in a flat B-203, Shiv Surbhi, Thakur Village, Kandivali (E) Mumbai 400 101 on rental basis for about four months and thereafter shifted to flat No.B-503 in the same Bldg. till 31.03.2005. Thereafter, on completion of period, he again arranged for another flat for him at A-404 at Gaurav Shikhar,

Thakur Village, Kandivali (E) Mumbai 400 101. He stated that the occupant of the said flat was a person who appeared to be south Indian and showed his willingness to identify him if he was brought before him. On 14.04.2005, the premises B-503, Shiv Surbhi, Thakur Village, Kandivali (E), Mumbai 400 101, was searched under a search warrant. The said premises was found empty without any furniture or goods except for some loose sheets of papers, cardboard cover etc., some of which bearing scribbling of telephone no., addresses etc. were taken over and seized."

7. Advocate Mr.Maqsood Khan, appearing for the petitioner, has relied upon, in support of his contention, the judgment of the Supreme Court reported in **1999(1) SCALE 49 [Powanammal v/s. State of Tamil Nadu & Anr.]**. In that case, order remanding the detenue to judicial custody relied upon in grounds of detention was passed in English. But Tamil version of that document was not supplied to detenu even though she specifically demanded for the same as she did not

know English. In this background of the matter, it was observed by the Supreme Court in its majority judgment as below :-

> "However, this court has maintained a distinction between a document which has been relied upon by the detaining authority in the grounds of detention and a document which finds a mere reference in the grounds of detention. Whereas non-supply of a copy the document relied upon in the grounds of detention has been held to be fatal to continued detention, the detenue need not show that any prejudice is caused to him. This is because of non supply of such a document would amount to denial of the right of being communicated the grounds and of being afforded the opportunity of making an effective representation against the order. But it would not be so where the document merely finds a reference in the order of detention or among the grounds thereof. In such a case, the detenue's complaint of non-supply of document has to supported by prejudice caused to him

in making an effective representation. What applies to a document, would equally apply to furnishing translated copy of the document in the language known to and understood by the detenue, should the document be in a different language.

8. As against this, learned APP Mrs.Pai, appearing for the respondents, has relied upon the judgment of the Supreme Court reported in AIR 1981 Supreme Court **1191 [Mst.L.M.S.Ummu Saleema v/s. B.B.Gujaral and another]** and also relied upon another judgment of the Supreme Court reported in **2005 AIR SCW 4127 [J.Abdul Hakeem v/s. State of Tamil Nadu and others]** In the first case of Mst.L.M.S.Ummu Saleema v/s. B.B.Gujaral, the detention was under COFEPOSA Act. The documents, which were not supplied to the detenu, were - (1) record of investigation revealing the trunk telephone calls booked from Telephone No.315 to different telephones on different dates; (2) record of investigation relating to the petrol which was put into jeep No.TMC 1850 owned by Shri Shamsuddin, brother of the detenu. Looking to the nature of documents, stated above, the Supreme Court came to the

conclusion that, every failure to furnish copy of a document to which reference is made in the grounds of detention is not an infringement of Art.22(5), fatal to the order of detention. It is only failure to furnish copies of such documents as were relied upon by the detaining authority, making it difficult for the detenu to make an effective representation, that amounts to a violation of the Fundamental Rights guaranteed by Art.22(5). The Supreme Court also held that, it is unnecessary to furnish copies of documents to which casual or passing reference may be made in the course of narration of facts and which are not relied upon by the detaining authority in making the order of detention.

9. Therefore, the test is, whether the statement of Govind Gupta, in para 5 of the detention order, is mere casual or passing reference in the course of narration of facts or it is a document relied upon by the detaining authority.

10. It is true that the detaining authority in its affidavit has stated that it has not relied upon the statement of Govind Gupta. But

it is to be borne in mind that para 5 refers to two statements of two brokers viz. Pramod Thakkar and Govind Gupta. It is not the stand of detaining authority that it had not relied upon the statement of first witness. Therefore, the defence now raised appears absurd. If in one para statement of two brokers are referred, their details are given and one statement is accepted as a document, upon which, reliance is placed, then detaining authority cannot be permitted to say that it had not relied upon other document. Particularly when both the documents are in support of creating certain rights in respect of property involved, and manner in which the statement of Govind Gupta is referred to in para 5 of detention order clearly shows that document has been relied upon for the purpose of coming to the conclusion about involvement of detenu in the activities of smuggling. Non-supply of document has, therefore, affected the rights of making an effective representation and that amounts to a violation of fundamental rights guaranteed by Art.22 (5) of the Constitution.

11. In the result, we pass the following order :-

:ORDER:

. Writ Petition is allowed.

. Rule is made absolute.

[D.G.DESHPANDE,J]

[S.A.BOBDE, J]